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Supreme Court of the United States

OCTOBER TERM, 1950

No. 487

KAY EDMONSTON, *Petitioner,*

vs.

JOHN MOORE (J. P. MOHR), Agent of the Federal Bureau of Investigation, et al.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit with Brief in Support Thereof

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Supreme Court of the United States

October Term, 1950

No.

Kay Edmonston, *Petitioner,*

vs.

John Moore (J. P. Mohr), Agent of the Federal Bureau of Investigation, et al.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States.

The petitioner, appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on October 13, 1950 (R. 31).

OPINIONS BELOW

No opinions in this cause have been rendered by the United States District Court for the District of Columbia or by the United States Court of Appeals for the District of Columbia Circuit.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 13, 1950 (R. 31). The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254 (1).

QUESTION PRESENTED

The question is whether an order of the United States District Court for the District of Columbia (R. 4) dismissing an action for conspiracy, malicious inquisition of lunacy, and false imprisonment, against eight of sixteen defendants, is a final order and therefore appealable.

STATUTES INVOLVED

THE FEDERAL RULES OF CIVIL PROCEDURE, 28 U.S.C.A. FOLLOWING SECTION 723c

Rule 54 (b) as amended December 27, 1946, effective March 19, 1948.

Judgment Upon Multiple Claims

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

TITLE 28, UNITED STATES CODE

Section 1291. *Final decisions of district courts*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court.

STATEMENT OF FACTS

The petitioner filed a civil action in the United States District Court for the District of Columbia against sixteen defendants for conspiracy, malicious inquisition of lunacy, and false imprisonment (R. 1). Eight of the defendants (respondents) filed motions to dismiss on the grounds the complaint failed to state a cause of action upon which relief might be granted (R. 3, 4). The action against these eight defendants was dismissed (R. 4) and the petitioner appealed.

In the United States Court of Appeals for the District of Columbia Circuit the appellees (respondents) filed motions to dismiss the appeal (R. 22, 27) on the grounds that, by virtue of Rule 54 (b), as amended, of the Federal Rules of Civil Procedure (p. 2), the order dismissing the complaint as to eight of sixteen defendants was not a final judgment, hence not appealable. The appeal was dismissed on October 13, 1950 (R. 31).

The petitioner is now seeking a review by this Court of the judgment in favor of the respondents of the United States Court of Appeals for the District of Columbia Circuit.

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals erred in ruling that, under Rule 54 (b), as amended, of the Federal Rules of Civil Procedure (p. 2), the dismissal of an action wherein

the liability is several, against one or more but less than all of the defendants, is not a final judgment.

REASONS FOR GRANTING WRIT

The petitioner asserts that a writ of certiorari should be granted in this cause under subdivision 5 (c) of Rules 38 of this Honorable Court because the United States Court of Appeals for the District of Columbia Circuit has rendered a decision involving an interpretation of Rule 54 (b), as amended, of the Federal Rules of Civil Procedure, which interpretation of said Rule 54 (b) has not been, but should be, settled by this Court.

The ruling of the United States Court of Appeals in the instant cause is in conflict with applicable decisions of this Honorable Court on the finality of judgment in the cases of *Hill* v. *Chicago & E. R. Co.* (1891), 140 U. S. 52, 35 L. ed. 331, 11 S. Ct. 690, and *Dickinson* v. *Petroleum Conversion Corporation* (1950), 338 U. S. 507, 94 L. ed. 280, 70 S. Ct. 322, which decisions will be mentioned in the argument and brief filed with this petition.

The petitioner asserts that the writ should be granted on both of these grounds for the reasons herein stated.

ARGUMENT AND BRIEF

I

Rule 54 (b), as Amended, of the Federal Rules of Civil Procedure Should Not Have Been Invoked in This Action.

Rule 54 (b), as amended, of the Federal Rules of Civil Procedure (p. 2), makes certain provisions concerning the adjudication of "one or more but less than all of the *claims*" in an action. This rule does not apply to the dismissal of all of the claims against one or more but less than all of the *defendants* in an action wherein the liability is several, hence has no relevancy whatever in the instant cause.

The complaint (R. 1) names sixteen defendants and presents three distinct claims against them—conspiracy (under 8 U.S.C.A. section 47), malicious inquisition of lunacy, and false imprisonment. Of the sixteen defendants, nine answered the complaint, and eight filed motions to dismiss the complaint on the grounds that it failed to state a cause of action upon which relief might be granted (R. 3, 4). When the United States District Court granted the motions to dismiss of the said eight defendants and ordered the action against them dismissed (R. 4, 5), the order was a final judgment upon *all* of the claims in the action and terminated the lawsuit against half of the defendants.

While the case against the remaining eight defendants is technically still pending, in the instant cause the dismissal of the complaint as to any defendant has the effect of *res judicata* in regard to all of the defendants.

II

The Ruling of the United States Court of Appeals for the District of Columbia Circuit in the Instant Cause Is Contrary to Established Legal Precedent.

1. App. D. C. 1913. The gist of an action on the case for conspiracy is the damage done the plaintiff, and not the conspiracy, which is mere matter of aggravation; and one of the several defendants may be found guilty and the others not guilty, although no conspiracy be proven.—*Hansen* v. *Nicoll,* 40 App. D. C. 228.

2. App. D. C. 1943. Liability in tort is several, not joint, however many participate in inflicting the wrong and whether they act separately or in conjunction.—*McKenna* v. *Austin,* 134 F. 2d 659, 77 U. S. App. D. C. 228, 148 A. L. R. 1253.

3. App. D. C. 1939. An action may be maintained against any of several joint tort-feasors without

joining the others, and, in an action against all, judgment may be rendered against any.—*Ewald* v. *Lane*, 104 F. 2d 222, 70 App. D. C. 89, certiorari denied Lane v. Ewald, 308 U. S. 568, 84 L. ed. 477, 60 S. Ct. 81.

4. App. D. C. 1917. Where two or more defendants are sued jointly for a several tort, if the evidence is not sufficient to hold one, there may be a discontinuance as to that one, and the trial may proceed as to the other.—*Potomac Electric Power Co.* v. *Hemler*, 147 App. D. C. 34.

5. 80 A. L. R. 1186. Judgment or order dismissing action as against one defendant as subject of appeal or error before disposition of case as against co-defendant.

III. Interests of defendants severable.

If a decree dismissing one or more of a larger number of defendants whose interests are not all connected with the others finally settles the cause as respects those defendants dismissed, such decree is final and appealable.—*Hill* v. *Chicago & E. R. Co.* (1891), 140 U. S. 52, 35 L. ed. 331, 11 S. Ct. 690; *McGill* v. *Commercial Union Assur. Co.* (1925; C.C.A. 4th), 5 F. 2d 589.

In previous decisions—items 1-4 above, the United States Court of Appeals for the District of Columbia Circuit has held that in actions of this nature, liability is not joint but several; that any or all of tort-feasors may be sued either jointly or severally; and that judgment may be rendered against any or against all.

This Honorable Court has ruled that dismissal is a final judgment in cases wherein the legal principle is virtually identical with that in the instant cause—namely, in *Hill* v. *Chicago & E. R. Co.* (1891), 140 U. S. 52, 35 L. ed. 331, 11 S. Ct. 690, and in *Dickinson* v. *Petroleum Conversion Corporation* (1950), 338 U. S. 507, 94 L. ed. 280, 70 S. Ct. 322. In the instant cause the liability is also several; the dis-

missal of the action as to eight of the sixteen defendants denies the petitioner relief on all of the claims against the respondents; the lawsuit is over so far as the respondents are concerned; further proceedings in this action can neither affect them nor be affected by them; and the dismissal of this action by the United States District Court for the District of Columbia is likewise a final judgment for purposes of appeal.

CONCLUSION

WHEREFORE, the petitioner prays that a writ of certiorari may issue in this cause under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia Circuit, and that upon such review the judgment of said United States Court of Appeals be reversed and set aside, and that this case be remanded to said court with instructions to proceed in accordance with the views of this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 487

KAY EDMONSTON, PETITIONER

v.

JOHN MOORE (J. P. MOHR) ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS JOHN MOORE (J. P. MOHR), HUGO B. PAUL, THOMAS GILLESPIE WALSH, ALBERT E. MARLAND, ISADORE RODIS, ZIGMOND M. LEBENSOHN, ROBERT T. MORSE IN OPPOSITION

OPINIONS BELOW

The United States District Court for the District of Columbia dismissed the complaint against the above-named defendants without opinion (R. 5). The Court of Appeals for the District of Columbia Circuit dismissed the appeal without opinion (R. 31).

JURISDICTION

The order of the Court of Appeals for the District of Columbia Circuit was filed on October 13, 1950 (R. 31). The petition for a writ of certiorari was filed on January 9, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an appeal lies from a decision of the district court, dismissing a complaint against less than all of the defendants in a conspiracy action, in the absence of the express determination that there is no just reason for delay and the express direction for the entry of judgment called for by F.R.C.P. Rule 54(b).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 54(b) of the Federal Rules of Civil Procedure:

> (b) Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as

to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims. [As amended Dec. 27, 1946; effective March 19, 1948.]

STATEMENT

Petitioner was the subject of an insanity proceeding in the latter part of 1948. After having been committed to Gallinger Municipal Hospital and transferred to St. Elizabeth's Hospital (R. 1), she was discharged when a jury found her to be of sound mind (R. 1, 8). Respondents were connected with these proceedings in connection with their official duties. Respondents Walsh, Marland, Rodis, Lebensohn and Morse had examined petitioner in their capacity as members of the Commission on Mental Health (R. 3-4); respondent Paul, a doctor at St. Elizabeth's Hospital, had treated petitioner while she was held there (R. 15-16); respondent Mohr, an F.B.I. agent, had interviewed petitioner prior to the initiation of the insanity proceedings (R. 16, 20).

After her discharge petitioner brought this action[1] against the above-named respondents and nine other persons (Pet. 5)[2] for "damages for conspiracy, malicious inquisition of lunacy, and

[1] The complaint was filed on July 15, 1949 (R. 1), *i.e.*, subsequent to the effective date of the amendment of F. R. C. P. Rule 54(b).

[2] Including her former attorney (Stanley, R. 18), relatives who signed commitment papers, and other physicians.

false imprisonment" (R. 1). Paragraph 2 of the complaint alleges (R. 1):

> That the defendants did unlawfully, wilfully and knowingly conspire together to maliciously institute lunacy proceedings against the plaintiff * * *

The above-named seven respondents moved to dismiss the complaint on the ground that the acts complained of were performed by them within the general scope of their official duties, and that they were consequently immune from personal liability.[3] The district court granted the motion; the order dismissing the complaint as to these defendants (R. 5) did not determine expressly that there was no just reason for delay and did not direct expressly the entry of judgment. The action remained pending in the district court as to the other eight defendants.[4] Petitioner appealed to the Court of Appeals for the District of Columbia Circuit, which dismissed the appeal on the ground that the order from which petitioner sought to appeal was not a final judgment of the district court (28 U.S.C. 1291) (R. 31). Petitioner seeks a review of this decision.

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[3] The cases of *Brown* v. *Rudolph*, 25 F. 2d 540 (C.A. D.C.), certiorari denied, 277 U.S. 605; and *Cooper* v. *O'Connor*, 99 F. 2d 135 (C.A. D.C.), certiorari denied, 305 U.S. 643 (R. 3ff), were specifically cited to the district court (R. 14-15).

[4] The district court dismissed the complaint against an eighth defendant (Stanley) in a separate order (R. 4).

ARGUMENT

The decision of the Court of Appeals was obviously correct. Pursuant to 28 U.S.C. 1291 appeals lie only from final decisions of the district courts. The determination whether a decision of the district court disposing of less than the entire action was final or merely interlocutory presented an extremely troublesome question for more than half a century.[5] *Dickinson* v. *Petroleum Corp.*, 338 U.S. 507, 511; *Reeves* v. *Beardall*, 316 U.S. 283. This uncertainty entailed serious hazards for the parties, especially for those who failed to take an appeal in the mistaken belief that the decision was not final. Cf. *Dickinson* v. *Petroleum Corp.*, *supra*, at 512.

The elimination of this hardship was the principal purpose of the revision of F.R.C.P. Rule 54(b).[6] *Dickinson* v. *Petroleum Corp.*, *supra*, at 512; Note to Rule 54(b), Advisory Committee's Report of Proposed Amendment to Rules of Civil Procedure (1946) 70-72. The revisers chose the simple solution that every decision of the district court which disposes of less than the entire action is considered interlocutory unless the district court

[5] The dismissal, as to less than all of the alleged conspirators, of a complaint based on a conspiracy, however, has consistently been considered an unappealable interlocutory decision. *Hohorst* v. *Hamburg-American Packet Co.*, 148 U.S. 262; *Garbose* v. *George A. Giles Co.*, 183 F. 2d 513 (C.A. 1).

[6] Rule 54(b) applies to a joinder of parties as well as to a joinder of claims; see *e.g.*, *Garbose* v. *George A. Giles Co.*, *supra*; Clark, *Experience under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 497, 503.

expressly determines that there is no just reason for delay and expressly directs the entry of a judgment. In the instant case, the district court failed to make such determination and direction; hence, the decision is not appealable.[7] *Garbose* v. *George A. Giles Co.*, 183 F. 2d 513 (C.A. 1);[8] *Kam Koon Wan* v. *E. E. Black, Limited*, 182 F. 2d 146 (C.A. 9); *Flegenheimer* v. *Manitoba Sugar Co., Ltd.*, 182 F. 2d 742 (C.A. 2); *Winsor* v. *Daumit*, 179 F. 2d 475 (C.A. 7).

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[7] Inasmuch as the order of the district court would have been interlocutory even prior to the amendment of Rule 54(b) (*supra*, fn. 5), this case does not present the problem whether the amendment did or could render interlocutory an order considered as final and appealable prior to the revision. All the circuits which up to now have been confronted with this problem have answered the question in the affirmative. Cf. *David* v. *District of Columbia*, 14 Fed. Rul. Serv. 54(b), Case 6, decided December 14, 1950 (C.A.D.C.).

[8] There, the court of appeals held that a "final" summary judgment, expressly directing the entry of a judgment dismissing the complaint against less than all of the co-conspirators, was interlocutory for lack of an express determination to the effect that there was no just reason for delay.

CONCLUSION

The decision below is correct; there is no conflict of decision. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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FEBRUARY, 1951.

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